NO. 80-1032

IN THE

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SUPREME COURT OF THE UNITED STATES

October Term, 1980

FRANCIS DUANE GARTNER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

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Question Presented

May a law enforcement officer engage in a warrantless inspection of a box of documents revealed to him by a citizen-informant known not to be the owner of the documents, where the officer observes no more than that already observed by the citizen-informant?

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* * * *

Statement of the Case

In an information filed by the District Attorney of Los Angeles County, California, petitioner was charged with 14 counts of grand theft, in violation of California Penal Code section 487, subdivision 1, and with 9 counts of forgery, in violation of California Penal Code section 470. (C.T. pp. 980-1004.)[1/] Petitioner pleaded not guilty. (C.T. p. 1005.)

Petitioner's motions to suppress evidence, and to quash and traverse a search warrant, were denied. (C.T. p. 1194.)[2/]

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1. "C.T." refers to the Clerk's Transcript included as part of the record on appeal in the state courts.

2. The constitutional provisions and California statutes relevant to petitioner's claim of error in denying (cont.)

Thereafter, petitioner withdrew his plea of not guilty and pleaded nolo contendere to one count of grand theft and one count of forgery. (C.T. p. 1194.)

Petitioner's renewed motion to suppress evidence, following his plea of guilty, was denied. (C.T. p. 1195.)

Proceedings were suspended and petitioner was granted probation for a period of 5 years with terms and conditions including that he spend the first 180 days in county jail. The remaining counts were dismissed on motion of the People. (C.T. p. 1195.) Petitioner was granted bail on appeal, and the county jail condition was stayed pending appeal. (C.T. pp. 1195-1196.)

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these motions are set forth in Appendix D to the Petition for Writ of Certiorari.

On August 4, 1980, in an opinion certified for publication and a separate memorandum not certified for publication, the judgment was affirmed by the California Court of Appeal, Second Appellate District, Division Two. (2 Crim. 35858; Petn. for Writ of Cert., Appen. B.) On August 19, 1980, petitioner's request for rehearing was denied by the California Court of Appeal. On September 2, 1980, the California Court of Appeal ordered its two opinions consolidated, and ordered that they not be published. On October 22, 1980, the California Supreme Court denied petitioner's request for hearing. (Petn. for Writ of Cert., Appen. C.)

* * * *

ARGUMENT

I

A Law Enforcement Officer's Warrantless Observations of Documents Revealed to him by a Citizen-Informant Known not to be the Owner of the Documents, is Proper Where the Officer Observes no More Than That Already Observed by the Citizen-Informant.

Petitioner was the owner of a fire and casualty insurance business which he sold to Jack Robert Boyer. As part of the transaction, Mr. Boyer took possession of all documents regarding policies handled by the business, and a box of documents belonging to petitioner inadvertently left with Mr. Boyer. Mr. Boyer opened the box, inspected the documents inside, and voluntarily showed them to a deputy sheriff of Los Angeles County, California. The deputy inspected the materials to the extent that they had been previously inspected by Mr. Boyer, and made copies of some of the

documents. From these observations, the deputy compiled a list of 177 insurance policy-holders whose refunds due them appeared to have been appropriated by petitioner for his own benefit, and discovered some cases where petitioner used refunds to pay for life insurance policies taken out on the policy-holders where the policy-holders had never applied for such life insurance. The deputy's observations were included in an affidavit in support of a warrant to search petitioner's business premises.

It is well-settled that actions of a private party in seizing evidence will not be attributed to the government for Fourth Amendment purposes when the private party turns the evidence over to the government. (Burdeau v. McDowell (1921) 265 U.S. 465, 475; see also Coolidge v. New Hampshire (1971) 403

U.S. 443, 487-490.) In this Honorable Court's most recent consideration of the subject, eight Justices affirmed the rule that where such evidence is made available to the plain view of law enforcement agents by a private citizen, it is not subject to suppression under the Fourth Amendment. (See Walter v. United States (1980) ___ U.S. ___, 100 S.Ct. 2395, 2398 - 2403; id., at pp. 2403-2404, White, J., conc., and pp. 2404-2406, Blackmun, J., dis.) Petitioner contends that a search by the government of a package previously examined but then closed by a private party is unlawful. He acknowledges that this question was left unresolved in Walter. (Petn. for Writ of Cert., p. 7; see also Walter v. United States, supra, at p. 2402, fn. 9; and id., at p. 2404, fn. 3, White, J., conc.) Respondent submits first, that the evidence shown

to law enforcement in the instant case was in plain view and falls within the scope of what was acceptable in Walter. Furthermore, the government agent acted properly in viewing no more than had been previously viewed by the citizen-informant.

In Walter v. United States, supra, 12 sealed packages containing 871 boxes of 8 millimeter film depicting homosexual activities were shipped by private carrier and mistakenly delivered to the wrong party. Employees of that party opened the packages, found suggestive drawings and explicit descriptions of the contents on individual film boxes, and contacted the FBI. Federal agents picked up the packages and, without obtaining a warrant, viewed the films with a projector. This led to indictments on obscenity charges relating to

interstate transportation of 5 of the 871 films. (Id., at pp. 2398-2400.) In its lead opinion, this Court stated that exhibition of the films was an unreasonable invasion of the owner's constitutional right of privacy. Citing Justice Stewart's concurring opinion in Stanley v. Georgia (1969) 394 U.S. 557, 569, the opinion noted that the film could not be inspected as plain view evidence since inspection required use of a projector. The fact that federal agents were lawfully in possession of the film did not give them authority to search the contents. An officer's authority to possess a package was held distinct from the authority to examine the contents, and although there was nothing wrongful about the agents' acquisition of the packages or examination of their contents to the extent that they had already been examined by

third parties, the agents improperly exceeded the scope of the private search when they viewed the films on a projector. (Id., at pp. 2400-2403.)

Contrary to petitioner's contention, the instant record establishes not only that the inspection of petitioner's documents by a law enforcement agent was no more extensive than the inspection already made by the citizen-informant, but also that the law enforcement agent observed only that which was specifically shown to him by the citizen-informant. Thus, the instant search did not exceed the plain view exception endorsed by this Honorable Court for evidence revealed to law enforcement by a private party where government agents see no more than what the private party had exposed to their view.

The instant record establishes that the citizen-informant showed the

sheriff's deputy ledger cards, books, and other documents from the box that had been left in the informant's possession by petitioner. (C.T. pp. 465-466.) In fact, the citizen-informant conducted the inspection by showing the contents of the box in question to the deputy sheriff.

"Q. [by defense counsel] You were also shown some records at that time, weren't you?

A. [by deputy sheriff] Right.

Q. Where were you shown those records?

A. It was in an office, just adjacent to Mr. Boyer's office [the citizen-informant].

Q. And what did the records look like when you were shown them?

A. <u>They were taken from a box</u>, and in the particular records that I was really interested in, I believe, they

were in a Manila folder, and there was maybe 100 to 200 pieces of paper in there with various clients, credit memos and dailies from the insurance companies.

Q. You were also shown -- did that envelope come from a particular box?

A. There was a box. I believe it was labeled 1974 records.

Q. And those records came from a box that was in that envelope, didn't they?

A. Right.

Q. Additionally, what else was on that label?

A. I couldn't say, possibly Duane Gartner & Company.

Q. Did it have any title on it, like accounting records, or Duane Gartner accounting records?

A. I can't recall.

"Now, that I think about it, I could

not even say for certain it was a box. It may have been a file drawer. I believe it was a box, but it could possibly be a file drawer full of records.

"Q. <u>But the records that he showed you that day all came out of the same either box or file drawer</u>?

A. Right, not a metal file drawer, one of these cardboard storage bins.

Q. Like a moving company would have?

A. Right.

Q. Do you remember the label, 1974, being on the box at least?

A. Right.

Q. Prior to being shown the records from that box, you had a conversation with Mr. Boyer, didn't you?

A. Yes.

Q. And in that conversation he

told you that he had inadvertently come into possession of some records during the sale of some business?

A. Right, that the box of records had been there by mistake, left by the moving people.

Q. He told you that the box of records were Duane Gartner's, didn't he?

A. Yes.

Q. He told you that by inadvertently, that meant to you that that box of records had been included in by mistake in the records that had been sent to Mr. Boyer?

A. Right.

Q. And at that time Mr. Boyer -- after this conversation, then you proceeded to review the records in the box?

A. Yes.

Q. And what did you do with them,

sir, if anything?

A. What did I do with the records?

Q. Yes.

A. Well, I looked through them, and Mr. Boyer gave me copies of maybe 100 of them.

Q. Did you make copies, or did he make the copies?

A. Well, I don't -- I am sure I didn't. I don't know whether he did or Camille may have.

Q. Did you pick out certain records and ask him to make copies of them?

A. I believe he made a copy of most everything that was in the Manila folder." (C.T. pp. 502-504; emphasis added.)

Respondent submits that the instant inspection was not an unreasonable search and seizure, in violation of the Fourth Amendment, made applicable to the

states by the Fourteenth Amendment. "The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter - to compel respect for the constitutional guarantee in the only effectively available way - by removing the incentive to disregard it." (Elkins v. United States (1960) 364 U.S. 206, 217.) The rule has no application to evidence voluntarily placed in the plain view of law enforcement officers by a private citizen. For example, in United States v. Ziperstein (7th Cir. 1979) 601 F.2d 281, pharmaceutical records were turned over to the government by a pharmacist employed by one of the defendants. The Court held that even if the employee had no authority over the records and the defendant had a reasonable expectation of privacy in the records, the records should not be suppressed since the government was not

involved in any impropriety in gaining the records. (Id., at p. 290.) Similarly, in United States v. Bulgier (7th Cir. 1980) 618 F.2d 472, a search of luggage by airport personnel prior to the government's involvement was held to be a private search not protected by the Fourth Amendment. Thereafter,

> "[t]he reopening and reinspection of the contents of a container by or in the presence of government authorities following a private search of the same container does not constitute a separate, independent search requiring a warrant." (Id., at p. 478; see also United States v. McDaniel (5th Cir. 1978) 574 F.2d 1224, 1225-1227, cert. den. 441 U.S. 952 (1979); and, United States v. Pryba (D.C. Cir. 1974) 502 F.2d 391, 398, cert. den. 419 U.S. 1127 (1975).)

The manner in which the private

citizen obtained the documents does not taint the government's acquisition of them. For example, in United States v. Foley (4th Cir. 1979) 598 F.2d 1323, a letter that was the subject of a protective order in a civil matter was turned over to the government and used in a criminal matter. The Court held that "[t]he government is not precluded from introducing improperly obtained evidence so long as it did not participate in the impropriety." (Id., at p. 1337.)

It is submitted that a bailee has a right not to be used as an unwilling depository of incriminating evidence or as an unwilling participant in the concealment of such evidence. Upon learning of the incriminating nature of the documents left in his possession, the citizen-informant's only reasonable course of conduct was to make the

materials available to law enforcement agents. The government can hardly be required to look the other way when such evidence is presented for plain view inspection. (See Marshall v. United States (9th Cir. 1965) 352 F.2d 1013, 1014-1015 (defendant gave his landlady an unlocked suitcase which she turned over to the FBI contrary to defendant's instructions).)

Petitioner maintains that the instant case presents an opportunity to resolve a conflict in the circuits regarding the extent of a warrantless government search following a search by a private party. (Petn. for Writ of Cert., pp. 7-8.) On the contrary, the circuit courts of appeal have generally upheld such searches except when the private party acted under color of government authority. (See, e.g., United States v. Newton (7th Cir. 1975) 510 F.2d 1149,

1153-1154; Corngold v. United States (9th Cir. 1966) 367 F.2d 1, 4-5.) In the case at bar, the citizen-informant examined the records in question when he purchased petitioner's business. (See Petn. for Writ of Cert., Appen. B, p. 4.) He did not act as a state agent when he discovered the incriminating documents.

A fair reading of the record made in the state courts leads inexorably to the conclusion that petitioner's records were not effectively under the control of law enforcement during the search. Rather, the citizen-informant made copies of the records available to the government agent. (See C.T. pp. 502-504, quoted supra.) Thus, petitioner's reliance on cases dealing with containers within the control of law enforcement is misplaced. (Petn. for Writ of Cert., p. 9; Arkansas v. Sanders

(1979) 442 U.S. 753; United States v. Chadwick (1976) 433 U.S. 1.)

Clearly, the instant matter fails to present any important federal question for resolution. The decision below is consistent with Walter v. United States, supra, and no questions left undecided in Walter are raised by the instant facts.

II

This Honorable Court Should not Grant a Writ of Certiorari to Review a Ruling on a Pretrial Motion Heard Prior to the Entry of a Plea of Nolo Contendere

Petitioner is asking this Court to render a decision on the admissibility of evidence never actually admitted in a state criminal trial. Following the denial of petitioner's pretrial motion to suppress evidence obtained pursuant to the instant search and seizure, petitioner elected not to go to trial (where the evidence in question may or

may not have been admitted on the issue of guilt), and pleaded nolo contendere, the functional equivalent of a guilty plea for the purposes of criminal law.

It is well-settled that a plea of guilty or nolo contendere is a waiver of trial and an admission of every element of the offense charged. (See Brady v. United States (1970) 397 U.S. 742, 748; McMann v. Richardson (1970) 397 U.S. 759, 766; Boykin v. Alabama (1969) 395 U.S. 238, 242, 242-243, fns. 4 & 5; United States v. Frankfort Distilleries (1945) 324 U.S. 293, 296; United States v. Norris (1930) 281 U.S. 619, 622.) Such a plea is proper if it represents a voluntary and intelligent choice among the alternatives open to the defendant. (North Carolina v. Alford (1970) 400 U.S. 25, 31.) Federal constitutional rights may be waived by such a plea (see Boykin v. Alabama, supra, at p. 243),

and a defendant who pleads guilty pursuant to a plea bargain is entitled only to what he bargained for. (Santobello v. New York (1971) 404 U.S. 257, 262.) He may not, by right, litigate all federal constitutional rights raised in pre-plea proceedings. "Ordinarily a plea of nolo contendere leaves open for review only the sufficiency of an indictment." (Brotherhood of Carpenters v. United States (1947) 330 U.S. 395, 412.)

In McMann v. Richardson, supra, this Court held that admissibility of an allegedly coerced confession could not be reviewed on habeas corpus following defendant's plea of guilty. Unless applicable state law provides otherwise, the plea is a waiver of the right to contest any evidence the state might have offered against the defendant. (McMann v. Richardson, supra, 397 U.S.

at p. 766.) While a defendant who pleads guilty does not waive all antecedent constitutional violations, a guilty plea does generally limit appellate review to claimed constitutional violations not inconsistent with the factual admission of guilt which a guilty plea involves.

"[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established."

(Menna v. New York (1975) 423 U.S. 61, 62-63, fn. 2.)

Petitioner herein unsuccessfully sought to exclude evidence prior to his plea of nolo contendere on the ground that the evidence was the product of an illegal search and seizure. Had he proceeded to trial, suffered a conviction and filed an appeal, a finding of an unlawful search and seizure would not per se result in a reversal. The rule is settled that if the erroneously admitted evidence was harmless beyond a reasonable doubt, e.g., there was overwhelming independent evidence of guilt, petitioner's conviction would be sustained. (See Harrington v. California (1969) 395 U.S. 250, 251-254; Chapman v. California (1967) 386 U.S. 18, 21-24.)

Respondent submits that petitioner's voluntary and intelligent nolo contendere plea following denial of his

motion to suppress provided the requisite overwhelming evidence of guilt which rendered irrelevant the constitutional violations of which he complains. In this regard the instant case differs from Menna v. New York, supra, at page 67, footnote 2, where this Court held that a guilty plea does not bar consideration of a double-jeopardy claim since the issue is whether the State may convict the defendant no matter how validly factual guilt is established. (Menna v. New York, supra, 423 U.S. at p. 63, fn. 2.)

Respondent acknowledges that California has, by statute, provided for appellate review of the denial of a pretrial motion to suppress evidence, notwithstanding the fact that the defendant pleaded guilty. (Cal. Pen. Code, § 1538.5(m).) This statutory right is not, however, constitutionally

mandated. When a criminal defendant admits, by way of a plea, every element of the charged offense, this Court should decline to review claims of constitutional error which are rendered moot by the plea.

Respondent submits that this Court should therefore deny the requested writ of certiorari to review the admissibility of evidence litigated in petitioner's pretrial motion to suppress evidence.

* * * *

CONCLUSION

For the foregoing reasons, respondent urges that the Petition for Writ of Ceriorari be denied.

Respectfully submitted,

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